No. 37

In the Supreme Court of the United States

OCTOBER TERM, 1958

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

LUBLIN, McGAUGHY & ASSOCIATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Two contentions advanced by respondents were not discussed in petitioner's main brief because, although strenuously urged in the courts below, they were apparently considered of no substance by the Court of Appeals as they are not even mentioned in the otherwise comprehensive treatment of the grounds for its decision. The *first* is that work on military installations is outside the coverage of the Fair Labor Standards Act because "military installations must be assumed to be instrumentalities of war, and *not* of commerce" (Respondents' Br., pp. 5, 14), and *second* that the greater part of their work "is placed beyond the coverage of the Act" by the "new construction" doctrine

(*id.*, pp. 5–6). These two contentions were doubtless passed over by the Court of Appeals because of its recognition that their unsoundness had already definitely been established by this Court's decisions in *Powell* v. *United States Cartridge Co.*, 339 U. S. 497; *Mitchell* v. *Vollmer & Co.*, 349 U. S. 427; and *Southern Pacific Co.* v. *Gileo*, 351 U. S. 493, 500. A *third* argument urged by both respondents and *amicus curiae*—that the substantial interstate communications, interstate transmission of documents and interstate travel, regularly engaged in by respondents' employees, do not constitute "transportation, transmission, or communication among the several States" within the scope of the Fair Labor Standards Act because the coverage of this Act was not intended to be coextensive with Congress's constitutional power—although anticipated and answered in our main brief (pp. 34–41)—can, we believe, be conclusively clarified by the legislative history bearing on the Congressional intent in deleting the "affecting" commerce language.

I

THIS COURT'S *POWELL* DECISION SETTLED THE UNSOUNDNESS OF RESPONDENTS' CONTENTION THAT WORK ON AN INSTRUMENTALITY OF WAR CANNOT BE WORK ON AN INSTRUMENTALITY OF "COMMERCE" WITHIN THE SCOPE OF THE FAIR LABOR STANDARDS ACT

The contention that because activities may be for military or war purposes they cannot be "commerce" within the scope of the Fair Labor Standards Act was definitely repudiated, more than eight years ago, by this Court's *Powell* decision (decided May 8, 1950). That decision specifically held within the

coverage of the Act the production and transportation of military munitions solely for the use of the United States Army for war purposes. In answer to "the precise question * * * whether the munitions were produced for 'commerce' when such production was for transportation outside of the state and for use by the United States in the prosecution of war, but not for sale or exchange" (339 U. S. at 511), the Court quoted this Act's statutory definition of "commerce" and ruled that the language includes "interstate shipments or transportation as such, and not merely * * * shipments or transportation of articles that are intended for sale, exchange or other trading activities," citing at this point its previous decisions holding that the federal "commerce" power extended to all kinds of "non-commercial" interstate movements and transactions (*id.* at 512).[1] Pointing out that "the primary purpose" of the Act was "not [simply] to regulate interstate commerce as such" but "to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation" and "to raise living standards without substantially curtailing employment or earning power," the Court noted particularly that the "Government's munitions plants provided an appropriate place for the beneficial ap-

[1] *E. g.*, *Edwards* v. *California*, 314 U. S. 160 (movement of indigents across state lines); *Thornton* v. *United States*, 271 U. S. 414 (diseased cattle ranging across state lines); *Caminetti* v. *United States*, 242 U. S. 470 (transportation of women across state lines for non-commercial immoral purposes); *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (insurance transactions, including transactions and communications between local agents and their out-of-state home offices).

plication of the Act's standards of working conditions without danger of reduced employment through loss of business" (*id.* at 510–511).

Respondents, ignoring *Powell*, rely upon lower court decisions which antedated *Powell* (*Laudadio* v. *White Construction Co.*, 163 F. 2d 383 (C. A. 2) and *Divins* v. *Hazeltine Electronics Corp.*, 163 F. 2d 100 (C. A. 2), Br., p. 14), and which, on this point, are plainly inconsistent with the principles of *Powell*. The reasoning of the *Powell* decision is patently as applicable to military installations which are instrumentalities of interstate commerce as to the production of munitions transported interstate—and this has been recognized by the lower court rulings subsequent to *Powell*. See *Mitchell* v. *Empire Gas Engineering Company*, 256 F. 2d 781, at 783 (C. A. 5):

> The differences between production of goods for commerce and the engaging in commerce are not such as to exclude the latter from the rationale of the *Powell* decision. Cf. *Alstate Construction Co.* v. *Durkin*, 345 U. S. 13, 73 S. Ct. 565, 97 L. Ed. 745. An instrumentality of war is not, solely by reason of being such, excluded from being an instrumentality of commerce.

See also *Mitchell* v. *Zachry Co.*, 127 F. Supp. 377, at 380 (D. N. Mex.) (holding that "the doctrine of the *Powell* case is applicable with equal force" to construction and improvement of runways at Holloman Air Force Base).[2]

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[2] Even the decisions which assumed (prior to *Powell*) that instrumentalities of war were not instrumentalities of commerce within the coverage of the Act recognized that military

II

RESPONDENTS' RELIANCE UPON THE "NEW CONSTRUCTION" DOCTRINE IS DIRECTLY CONTRARY TO THIS COURT'S DECISIONS IN *VOLLMER* AND *SOUTHERN PACIFIC CO.* v. *GILEO*

Respondents' contention that the "new construction" doctrine overrides the "liberal construction" principle in determining the coverage of work on construction projects (Br., p. 5) rests on a plain misapprehension of this Court's decision in *Vollmer*, 349 U. S. 427, *supra*.

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air bases and shipyards are instrumentalities of commerce by reason of their unquestioned use "to facilitate the transportation of persons, mail and articles of commerce in general," as well as "for purely combat activities." *Scholl* v. *McWilliams Dredging Co.*, 169 F. 2d 729 at 732 (C. A. 2). On the same reasoning, employees working on cargo transports were held covered by the Act in *Divins* v. *Hazeltine Electronics Corp.*, *supra*. Also in *Laudadio*, *supra*, the same court held that the Floyd Bennett Airfield continued to be an instrumentality of commerce after it became an Air Force Base, on the ground (judicially noticed) that "it is extremely likely that the Navy did make some use of the Field for interstate commerce, such as the arrival and departure of officers, men and mail in interstate journeys," and accordingly held that work relating to "extending existing runways, reconstructing the control tower of the Administration Building and making additions to existing hangars, was work on *instrumentalities of commerce*" within the coverage of the Act (163 F. 2d at 385, emphasis added). To the same effect see *Ritch* v. *Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334, 335 (C. A. 9, 1946), holding that the dredging of new channels in the harbor of the Bremerton Navy Yard for use by combat vessels was "commerce" within the coverage of the Act by reason of the use of combat vessels "in the transport of the mails of non-combatants as well as combatants" and "in the transportation from out of the states of commercial merchandise."

In view of the *Powell* decision, it is plain that this distinction between "commercial" use and "war" use is no longer significant.

Vollmer, of course, stands for precisely the opposite of respondents' interpretation. If there were any doubt of the import of *Vollmer* itself, it was unmistakably resolved by the express statement shortly thereafter in *Southern Pacific Co.* v. *Gileo*, 351 U. S. 493 at 500, that "[t]his Court recently rejected the 'new construction' doctrine in determining whether an employee is 'engaged in commerce' within the meaning of * * * the Fair Labor Standards Act [citing *Vollmer*]." The fact that respondents' plans and specifications are for "new" structures, therefore, does not mean that they are outside the scope of this Act. On the contrary, since, as the court below found, the projects for which respondents prepare plans, specifications, etc. "include, primarily, projects for the improvement, enlargement and repair" of "interstate instrumentalities" such as "airfields, shipyards and radio stations for the United States military services" (R. 144a, 146a), they fall directly within the coverage principles of the *Vollmer* decision (see the numerous decisions cited in petitioner's main brief, pp. 21–22, n. 5).

III

THERE IS NO MERIT IN THE CONTENTION THAT EMPLOYEES ENGAGED IN INTERSTATE ACTIVITIES INDISPUTABLY WITHIN THE *STATUTORY* TERMS OF COVERAGE ARE EXCLUDED FROM THE ACT BECAUSE ITS COVERAGE WAS NOT MADE FULLY COEXTENSIVE WITH THE FEDERAL CONSTITUTIONAL POWER TO REGULATE MATTERS "AFFECTING" COMMERCE

Despite the indisputable fact that the regular and substantial interstate communications, interstate transmission of documents, and interstate travel in this case are "transportation, transmission, or communica-

tion among the several States" within the literal terms of the statutory definition (Section 3 (b)), respondents and the *amicus curiae* contend that these activities are excluded from the Act's coverage because they merely "affect or indirectly relate to interstate commerce" and Congress did not intend to extend its regulation "to the furthest reaches of federal authority," citing *McLeod* v. *Threlkeld*, 319 U. S. 491 (Respondents' Br., pp. 16–17; Amicus Br., pp. 39, 42). This argument, in addition to its erroneous factual characterization of these interstate activities as "merely incidental" to a "primarily intrastate" operation or business (see petitioner's main brief, pp. 19–20, 24, 40–41), ignores the distinction expressly made in *McLeod* itself between activities which merely "affect" commerce and activities which "are actually in or so closely related to the movement of the commerce as to be a part of it" (319 U. S. at 497). The interstate activities of respondents' employees clearly are not merely activities which "affect or indirectly relate to interstate commerce" but are themselves "actually in" and "a part of" interstate "transportation, transmission, or communication."

A. The view that Congress must not have intended these statutory terms to have full scope, but must have meant to limit their application to *employers* engaged in such activities as the primary "trade" or "business," manifestly rests upon a lack of awareness of the legislative history of this Act and, in particular, upon a misapprehension of the import of the legislative deletion of the provision in earlier bills relative to *intrastate* activities "affecting commerce."

It is of course true, as this Court has several times pointed out, that the deletion of the "affecting commerce" provision is clear evidence that "Congress did not exercise in this Act the full scope of the commerce power" (*Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 at 570–571; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517 at 522; *McLeod* v. *Threlkeld*, *supra*). However, the Court has also repeatedly emphasized that Congress did intend the *statutory* terms of coverage to have full scope, and that these terms must be liberally construed. The Court has taken pains to explain that "the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce'" (*Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 128), for "the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce" (*Jacksonville*, *supra*, 317 U. S. at 567), and the literal terms of the statutory definitions should be accorded the "[b]readth of coverage" intended by the "bold and sweeping terms" in which the Act's purposes were declared and the "terms of substantial universality" in which "[i]ts scope was stated" (*Powell*, *supra*, 339 U. S. at 516; see also *Roland Electrical Co.* v. *Walling*, 326 U. S. 657, 668–671; *Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, 181–182).

This Court's decisions have frequently reviewed or referred to the legislative history supporting the broad construction of the statutory coverage terms. If carefully read, these decisions suffice to establish the lack of merit in the type of argument here advanced

by respondents and *amicus curiae*. However, in view of the persistent recurrence of the charge that coverage of this Act has been administratively stretched beyond the original legislative intent, a brief review of the perhaps forgotten legislative history relating to the deletion of the "affecting commerce" language may be helpful. To that we now turn.

B. 1. As the Court noted in *Kirschbaum, supra* (one of the earliest decisions construing the coverage of this Act, June 1, 1942), the bill recommended by the conference committee, which was enacted into law, did not adopt the provisions of the House bill which would have applied to employers "engaged in commerce in any industry affecting commerce," nor did it include the provision of the original bill which "incorporated the *Shreveport* doctrine * * *, in that it was specifically made applicable to *intrastate* production which competed with goods produced in another State" (316 U. S. at 522–523, emphasis added).[3]

There is no question that earlier bills were aimed at taking full advantage of the federal constitutional power to regulate commerce, both to the extent that its exercise had been upheld previously and as it might be construed in the future.[4] The sweeping

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[3] The *Shreveport* doctrine takes its name from the main locality involved in the classic case of *Houston & Texas Ry.* v. *United States*, 234 U. S. 342.

[4] One of the main objectives undoubtedly was to retain, insofar as might prove constitutionally feasible, some of the improved labor standards of the industry codes under the ill-fated National Industrial Recovery Act (held unconstitutional in *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, May 27, 1935), which had undertaken regulation of wages and hours in substantially all industry "throughout the

purpose of the original bill was stated to be "the *elimination* of substandard labor conditions in occupations *in and directly affecting* interstate commerce" (emphasis added).[8] As explained by Assistant Attorney General Jackson at the outset of the Joint Hearings:[9]

> The Supreme Court has upheld various types of regulation of interstate commerce upon several distinct constitutional theories. The attempt is to consolidate in a single bill all hopeful approaches to constitutionality, each complete in itself, so that if one or more falls at the hands of the Court, we will not be left

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country" "without * * * limitation" to activities "in" or "affecting" interstate commerce. See *id.*, 295 U. S. at 542; see also Joint Hearings before the Senate Committee on Education and Labor, and the House Committee on Labor, on S. 2475 and H. R. 7200, 75th Cong., 1st Sess., pp. 25–26, 64–65, 73, 155–172, 174–175; Robert L. Stern, *The Commerce Clause and the National Economy, 1933–1946*, 59 Harvard Law Review 645, at 661–664, 884.

The disclaimers by the sponsors of the proposed bill that it was unlike N. R. A., although it was "popularly called a new N. R. A." (see Joint Hearings, p. 25), obviously had reference to the careful efforts to keep the proposed bills within constitutional limits, both with respect to the commerce power and the delegation of legislative power.

[8] The subsequent bill, passed by the House, deleted the word "directly" preceding the term "affecting commerce" (see H. Rept. No. 2182, 75th Cong., 3d Sess.). However, this omission was undoubtedly counterbalanced by the standards and procedures prescribed for determination that an industry was one "affecting commerce," which was made a prerequisite to any application of the statutory standards (see *infra*, pp. 17–18).

[9] Joint Hearings, cited *supra*, fn. 4.

for an interval while a new bill is being adopted. [Hearings, p. 2].'

It was an "effort to get into one bill all of the avenues by which the bill can be held constitutional," so as "to take advantage of whatever theories may prevail on the Court at the time that the case is heard" (*id.*, p. 54).

Against this background, the question with which we are here concerned is: To what extent were the deleted "theories" or "approaches" (mentioned in *Kirschbaum, supra*, pp. 8, 9) intended to limit the coverage of the Act as finally enacted. The answer to this question, as the legislative history shows, is that the only limitation apparently intended was to exclude *intrastate* activities whose coverage would depend solely on the doctrine of the *Shreveport* case; for at the same time, significantly, Congress resolved the differences and uncertainties in other provisions of the earlier bills which might have left in doubt the purpose to cover "each" and "any" *employee* "engaged in com-

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[1] After listing the Supreme Court holdings on commerce questions, he continued (*id.*, p. 4):

> It will be observed that these theories of the interstate commerce power, as laid down by the Court, are complicated and overlapping and that some could be directly and automatically applied while others could be applied only where circumstances were found to warrant. It was therefore inevitable that any bill which tried to use these available weapons to fortify itself against the constitutional attack which labor and commerce legislation always faces, should to a considerable extent sacrifice simplicity. For neither the subject-matter of the bill nor the legal theories underlying it can with practical safety be reduced to any one simple formula.

merce or in the production of goods for commerce" (see Sections 6 and 7 of the Act). In short, while Congress undeniably abandoned the original specific provision covering "even local" intrastate production on the basis of the *Shreveport* doctrine, it was careful to remove any doubt of the Congressional intent to extend the Act's coverage—in terms of "substantial universality" (see *Powell, supra,* 339 U. S. at 516–517) and "throughout the farthest reaches of the channels of interstate commerce" (see *Jacksonville Paper, supra,* 317 U. S. at 567)—to each individual *employee* "engaged in commerce or in the production of goods for commerce", to the full extent of the broad statutory definitions of those terms (unless specifically exempted). This is made clear by a comparison of the differences in the bills which originally passed the Senate and the House, respectively, with the final conference bill which was enacted into law substantially unchanged, and is corroborated by the legislative hearings and debates.

2. Consideration of the coverage provisions of the bill as originally introduced (S. 2475 and H. R. 7200, introduced May 24, 1937) is particularly pertinent, because the coverage language of the final Act followed (in more expanded form, except for deletion of the specific provision based on the *Shreveport* doctrine, see *infra,* pp. 18, 22–23) one of that bill's alternative "hopeful approaches to constitutionality, each complete in itself," *i. e.* Part III, which was entitled "Unfair Goods Barred from Interstate Commerce." Part III consisted of Sections 7 and 8. Section 7 (c) provided coverage for "any *employee* engaged in interstate

commerce or in the production of goods intended for transportation or sale" (emphasis added) in interstate commerce, and these terms were broadly defined in the definition section of the bill.[8] In addition, Section 8 provided coverage for "employees of an employer or class of employers *not* engaged in the sale or shipment of goods in interstate commerce or in the production of goods for sale or shipment in interstate commerce" (emphasis added), where it was administratively determined that the effect of any substandard labor condition gave such employers "an unfair competitive advantage over employers engaged in interstate commerce or in the production of goods for sale or shipment in interstate commerce" (Sec. 8). The latter provision was expressly designed "to take advantage of the doctrine that even local matters may be regulated where they have the effect of introducing any unfair competition with interstate commerce," "under the *Shreveport case* and the *New York Central case*"[9] (see *Joint Hearings, supra,* pp. 50–51, 59).[10]

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[8] Section 2 (a) (2), (21) and (24). The definition of "interstate commerce" was virtually identical to the one in the Act as enacted. The definitions of "goods" and "produced" were subsequently broadened (see *infra*, p. 22).

[9] *Houston & Texas Ry.* v. *United States*, 234 U. S. 342; *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. RR. Co.*, 257 U. S. 563.

[10] The assertions made by the sponsors that this comprehensive bill did not attempt to cover "purely local pursuits or intrastate service trades" clearly implied no intent to limit the full scope of its broad coverage terms, but were simply disclaimers of the charge that the bill went as far as the National Industrial Recovery Act and exceeded the constitu-

The intent to exercise the full constitutional limits of the language used in each of the sections of this bill was clearly brought out in the Joint Hearings. It was explicitly stated that there was "some overlapping" in the bill's provisions because the effort was to take advantage of all precedents that might support

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tional power. See, *e. g.*, Senator Black's statement, "Now notice how different this bill is from the N. R. A. First. It applies only to interstate industries and those local industries which substantially and materially compete with interstate industries. It leaves the entirely local employer and the small employer alone" (81 Cong. Rec., 75th Cong., 1st Sess., Pt. 10, p. 1480). See also the statement of Senator McGill where, after describing the provisions of Part IV of the bill which provided "an alternative legal basis for regulation since they are based upon the theory that substandard labor conditions which directly affect interstate commerce may be controlled by Congress," he concluded:

> While the bill closes the channels of interstate commerce to goods produced under unfair labor conditions, the bill does not attempt to cover purely local pursuits or intrastate service trades [*id.*, pp. 1504–1505].

That the sponsors were not suggesting any limitation on the scope of the language of Part III with respect to "any employee engaged in interstate commerce or in the production of goods intended for transportation" in interstate commerce was clearly brought out during the Joint Hearings on the bill, and is corroborated by the subsequent adoption of express exemptions deemed necessary in order to exclude "retailers" and "service trades, such as the filling-station attendant, and the pants presser" and the "local merchant" who, because of his location near a State line, might be delivering goods across the line. In stating that "[i]t was not intended by this bill to apply generally to retailers or to apply to the service trades * * * and small business generally," Assistant Attorney General Jackson explained that "disregarding that exemption" (the bill then contained a provision exempting businesses employing less than a fixed number of employees), this bill "as it now stands"

each of them (*supra*, pp. 10–11), and that the bill incorporated the constitutional theories of decisions construing a wide variety of federal regulatory statutes, including decisions under the Sherman Act, the Mann Act, the Fugitive Felon Act and the "diseased cattle" statute (see Joint Hearings, pp. 2–4, 17, 58–60; cf. the assertions by respondents, Br., pp. 27–28, and *amicus curiae*, Br., p. 40, that these decisions are wholly

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would apply to "the retailer who is located close to a State line and sold his goods by delivery across a State line" and to "a local retailer, who by his labor practices and standards was able to affect the interstate movement of goods" (Joint Hearings, *supra*, pp. 35–36). The bill at that time did not have either the "local retailing capacity" or the "retail establishment" exemptions which it was deemed necessary to provide in subsequent bills and in the Act as enacted. The original bill was amended before it was reported to the Senate so as to expressly exclude, *inter alia*, persons employed in a "local retailing capacity" from the definition of "employee" (S. Rept. No. 884, 75th Cong., 1st Sess., p. 6). It was in this context that the committee report accompanying the bill (as thus amended) stated:

> The bill carefully excludes from its scope business in the several States that is of a purely local nature. It applies only to the industrial and business activities of the Nation *insofar as they utilize the channels of interstate commerce*, or seriously and substantially burden or harass such commerce. * * * For example, the policy in this regard is such that it is not even intended to include in its scope those purely local and small business establishments that happen to lie near State lines, and solely on account of such location, actually serve a wholly local community trade within two States [*id.*, p. 5, emphasis added].

The "retail establishment" exemption contained in Section 13 (a) (2) of the Act, as enacted, was added to make clear that "retailers located near the state lines" as well as "a retailer purchasing goods from without the state" would be exempt (see *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 at 571).

irrelevant),[11] as well as more recent decisions under the Wagner Act (Hearings, p. 59).

The specific language of Section 7 (c) of the original bill (which, as we have pointed out, was the source of the coverage language of the Act as enacted) was explicitly premised on the broad principles that "conditions of employment of workers immediately engaged in interstate commerce, may be regulated by Federal law" and that "regulation of employment conditions among workers engaged in producing goods intended to be shipped in interstate commerce is merely a device designed to make effective at an early stage the prohibition against the interstate shipment"; the decisions invoked include the *Wilson* v. *New, Virginian Railway, Washington Coach Co.* v. *Labor*

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[11] Assistant Attorney General Jackson pointed out that "the court has held that * * * diseased plants, diseased animals, or disease-bearing textiles could certainly be forbidden to enter the channels of interstate commerce" (Joint Hearings, p. 17). And he summarized the "long established precedents" supporting Section 7 of the proposed bill by quoting the following from *Ky. Whip & Collar Co.* v. *Ill. Central R. Co.*, 299 U. S. 334, 346:

> The power to prohibit interstate transportation has been upheld by this Court in relation to diseased livestock, lottery tickets, commodities owned by the interstate carrier transporting them, except such as may be required in the conduct of its business as a common carrier, adulterated and misbranded articles, under the Pure Food and Drugs Act, women for immoral purposes, intoxicating liquors, diseased plants, stolen motor vehicles, and kidnaped persons. [See Joint Hearings, p. 4; see also pp. 58–59].

See also this Court's recognition of the pertinence of such decisions to the coverage terms of this Act. *United States* v. *Darby*, 312 U. S. 100, 113–114, 122, 124; *Powell*, *supra*, 339 U. S. at 512.

Bd., *Stafford* v. *Wallace* and *Coronado Coal Company* cases [12] (Joint Hearings, p. 59).

3. The bill as passed by the Senate on July 31, 1937 (81 Cong. Rec. 7957), while dropping the specific provision based on the *Shreveport* doctrine, retained the original bill's basic coverage language of Section 7, *supra*, pp. 12–13, together with the broad definition of "commerce"; the Senate bill also broadened the original definitions of "produced" and "goods." In contrast to the bill which was later passed by the House on May 24, 1938 (83 Cong. Rec. 7449), the Senate bill thus rested coverage upon the nature of the individual *employee's* activities. The House bill made coverage dependent exclusively upon the character of the employer's business (H. Rept. No. 2182, 75th Cong., 3d Sess.), its coverage applying to "[e]very *employer* engaged in commerce in any industry affecting commerce" (Sections 4 and 5; emphasis added).

Although superficially it might appear that the "affecting commerce" language of this House bill provided a broader coverage than the Senate bill, its actual coverage was substantially narrower. See *Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, at 182, n. 4. Not only was its applicability limited to an "employer engaged in commerce"—defined to mean "an employer in commerce, or an employer engaged, in the ordinary course of business, in purchasing or selling goods in commerce" (Sec. 3 (k))—but its

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[12] *Wilson* v. *New*, 243 U. S. 332; *Virginian Railroad Co.* v. *Federation*, 300 U. S. 515; *Washington Coach Co.* v. *Labor Bd.*, 301 U. S. 142; *Stafford* v. *Wallace*, 258 U. S. 495, 520; *Coronado Coal Co.* v. *U. M. Workers*, 268 U. S. 295.

application depended upon the additional administrative finding, after hearings, that the employer was engaged in an "industry affecting commerce," which, in turn, depended upon meeting prescribed standards of substantial relationship to interstate commerce (Sec. 6)."[13] Its coverage was further limited by the provision for judicial review of the administrative declaration that an industry was "an industry affecting commerce" (Sec. 8). Since this House bill omitted all reference to "production of goods" and covered only the employer "engaged in commerce" even if his industry was found to be one "affecting commerce," it seems clear that it did not by the mere use of the "affecting" language provide any broader (if as broad) coverage than the "production" coverage of the Senate bill or the Act as finally enacted.

4. The conflict between the Senate bill's "employee" test of coverage and the House bill's "employer" test, as this Court has repeatedly recognized, was deliberately resolved in conference in favor of the Senate version[14] (H. Rept. No. 2738, 75th Cong., 3d Sess., pp. 29, 30). The "affecting commerce" language of the House bill was thus dropped in the context of dropping the *"employer"* test. The "affecting commerce" language had never appeared in any draft bill as a term describing or modifying the *employee's* ac-

[13] The standards prescribed were "(a) that the activities of such industry are Nation-wide in their scope, or (b) that such industry is dependent for its existence upon substantial purchases or sales of goods in commerce and upon transportation in commerce, or (c) that the relation of such industry to commerce is in other respects close and substantial * * *."

[14] See the *Kirschbaum*, *Jacksonville Paper* and *Overstreet* decisions, discussed in petitioner's main brief, p. 25.

tivities, and therefore its deletion implied no restriction of the coverage of the Senate bill (which was phrased in terms of the employee's activities, *supra*, p. 17). There was no occasion to use the "affecting commerce" language in order to extend the full scope of coverage to "each" and "any" employee "who is engaged in commerce or in the production of goods for commerce," as those terms were broadly defined in the conference bill. The Congressional intent to exercise its commerce power to the farthest limits of this language is clearly evident, as this Court has stated, from the Act's declaration of its "purposes in bold and sweeping terms" and the statement of its scope "in terms of substantial universality," as well as from its "specificity in stating exemptions" (see *Powell, supra*, 339 U. S. at 516–517). The final bill achieved as comprehensive coverage, within the coverage finally adopted, as the "affecting commerce" language of earlier bills, by making its own finding [15] that substandard labor conditions "in industries engaged in commerce or in the production of goods for commerce" had the detrimental effects which warranted "the exercise by Congress of its power to regulate commerce * * *, to correct and as rapidly as practicable to eliminate the conditions * * *" (Section 2), and then making the Act automatically applicable to "any" and "each" *employee* so engaged.

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[15] See *United States* v. *Darby*, 312 U. S. 100, upholding the constitutionality of the "production" provisions of the Act on the ground of the power of Congress to "regulate intrastate activities where they have a substantial effect on interstate commerce" (*id.*, at 119) and pointing out that "sometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act * * *" (*id.*, at 120).

That the deletion of the "affecting commerce" language was not intended to restrict the scope of the language finally adopted is further corroborated by the fact that the Congressional debates on the conference bill were obviously premised on the assumption that its terms invoked the limits of the constitutional power; the debates were concerned solely with the extent of the constitutional power in view of the then unsettled and conflicting concepts of its scope. Fo. example, Senator Borah, one of the Senate Managers on the conference committee, who was obviously speaking of "those engaged in interstate commerce" in the generic sense in his answers to charges made by Senators Bailey and Glass that the statutory language exceeded constitutional limits, summed up his view of the intended scope of the language as follows:

> * * * We are laying down the general principle that Congress may regulate the minimum wage of those engaged in commerce. If we should fail to establish that fact under the law, of course the case would fail; but all we are seeking to do in this bill, so far as that question is concerned, is to protect the minimum wage of those who are engaged in interstate commerce. It may be said that a particular individual is not in interstate commerce. If he is not, then he is not covered by the bill; but, if he is, he is covered by the bill [83 Cong. Rec., 75th Cong., 3d Sess., Part 8, pp. 9168–69].
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> * * * * *
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> There has not been a more full, complete, and accurate definition of interstate commerce than was written by John Marshall in the *Gibbons* case, and we have not undertaken in this bill,

at least we thought we were not undertaking to go outside the definition announced nearly 150 years ago. What we intended to do was to deal alone on the question of minimum wages with the men who are engaged in interstate commerce. If we have been unfortunate in our language, that is one thing, but our intention and our sole purpose was to deal with those engaged in interstate commerce. In my opinion the language carries out that idea. I may be mistaken as to that, but I am not mistaken as to what our intention was, because we discussed it off and on for 9 long days [*id.*, p. 9172]."[18]

[18] At a later point, Senator Borah again explained:
"Mr. President, a brief word as to what we undertook to do. The Senator [Mr. Bailey] has argued that certain people working in certain conditions under certain circumstances in certain places would not be engaged in interstate commerce. That may be true. In many instances referred to that would be true. But if the Court so holds, then such a worker would not be covered by the bill. All we have undertaken to say is that those engaged in interstate commerce shall pay a minimum wage of 25 and 30 cents an hour for the first and second years. We have gone no further than to announce the general principle as to those engaged in interstate commerce and if the court finds, as it must find, pro or con upon the question, the particular case must fall or rise according to whether the Court finds the parties are engaged in interstate commerce. But we have not extended the rule by the terms of the measure itself. We have said that those employed in interstate commerce are to be covered. The Court must determine whether or not they are employed in interstate commerce. If they are employed in interstate commerce then they are protected by the bill and covered by the bill. We could not do other than lay down a general principle and announce the general principle of protecting those engaged in interstate commerce. There is one phrase which seems to me objectionable, but under the Jones-Laughlin

It is likewise significant that, insofar as the Act as enacted differed from the coverage provisions of the original bill (*supra*, pp. 12–16), its coverage was in fact expanded in several substantial respects—apart from the deletion of the provisions covering intrastate producers under the *Shreveport* doctrine. For example, the "limiting language" on "production of goods *intended for transportation or sale in*" commerce was omitted and the broader phrase "production of goods for commerce" substituted (see *Alstate Construction Co.* v. *Durkin*, 345 U. S. 13 at 15, emphasis added). In addition, the basic minimum standards were made self-executing, the original bill's requirement of an administrative order before the statutory standards became operative on any employment being abandoned. And broadened definitions of "goods" (to include "subjects of commerce of any character") and of "produced" (to include the language "in any process or occupation necessary to the production") were adopted."

In net result, therefore, the Act as enacted (apart from the deletion of the specific section based on the *Shreveport* doctrine) provided a broader scope of coverage than any of the preceding bills. For, what

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decision it was thought by the conferees it was justified" (*id.*, p. 9175). (The particular phrase referred to is nowhere identified.)

" The broadened definitions were also in the bill passed by the Senate.

This definition of "produced" was subsequently amended by the Fair Labor Standards Amendments of 1949 (63 Stat. 910, 911; 29 U. S. C. 203 (j)) to substitute the language "closely related" and "directly essential" for the word "necessary."

the conference committee decided to do was to abandon the procedure provided in all previous bills which would have made coverage dependent upon administrative findings of "substantial" or "direct" effects on commerce, or which would have allowed broad administrative discretion to grant exemptions (see, *e. g.*, Sections 4, 6 and 8 of the original bill S. 2475 and as passed by the Senate; and Sections 6 and 8 of the bill as passed by the House). Instead, Congress decided to substitute its own findings to serve as a basis for widespread, self-executing, application of the minimum standards, subject only to the exemptions stated with detailed specificity in the statute itself. It is evident that the conference committee deliberately concluded to go to the limits of its constitutional power with respect to employees engaged "in" interstate commerce or in the "production of goods for [interstate] commerce," leaving it to the Court to resolve *ad hoc* the differing views as to what particular activities fell within those constitutional limits.

Respectfully submitted.

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